State v. Riofta, No. 79407-3
Dissent by C. Johnson, J.

No. 79407-3

C. JOHNSON, J. (dissenting)—The majority rewrites RCW 10.73.170, engrafting a burden from the court rule for newly discovered evidence. In doing so, the majority ignores the legislative intent underlying the statute and the plain wording of the statute. RCW 10.73.170(3) provides that the motion for postconviction DNA (deoxyribonucleic acid) testing shall be granted if "the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." This statutory directive is at issue in this case, and underlying the statutory interpretation is the question of what requirements must be met to have DNA evidence tested.

The legislature enacted RCW 10.73.170 to set the burden for

postconviction DNA testing and not to establish requirements for a new trial. The legislature's intent with this statute is to provide postconviction DNA testing where doing so could potentially exonerate a convicted person. Obviously, testing will sometimes help a person if it later establishes his or her innocence. But sometimes it will not help. The intent of the statute is to provide for testing; the result of the testing is not the focus. In testimony supporting the 2005 amendments, it was noted that DNA testing "has been a remarkable tool for overturning wrongful convictions across the United States [and] helps to ensure that justice is administered correctly for those few people that have been convicted of crimes that they did not commit." H.B. Rep. on Substitute H.B. 1014, at 4, 59th Leg., Reg. Sess. (Wash. 2005).

But, here, the majority has created an extra burden to obtain postconviction DNA testing similar to that for newly discovered evidence. We have previously held that to warrant the granting of a new trial under CrR 7.5 on the ground of newly discovered evidence, it must, among other things, appear the evidence is such as *will probably change the result* if a

new trial is granted. *State v. Peele*, 67 Wn.2d 724, 409 P.2d 663 (1996). The majority reasons the question here is whether postconviction DNA test results could actually exonerate a defendant. Majority at 11 n. 4. Not only is such a burden similar to that for newly discovered evidence, but the majority's restrictive reading and rewriting of the statute creates a burden inconsistent with the intent of the statute for requesting postconviction DNA testing. Such a burden ignores the fact that such results cannot be known until after the testing is completed.

The majority's reading of the statute to require a "could exonerate" standard is also inconsistent with the plain wording of the statute. *Id.* We have held if a statute is plain on its face, a court should not engage in judicial construction by adding language to the statute. *See, e.g., Restaurant Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) ("a court must not add words where the legislature has chosen not to include them"). This statute is specific on what burden must be met and needs no construction.

RCW 10.73.170(3) expressly establishes the "burden" a person must

show. It provides that the court shall grant the request for DNA testing if "the convicted person has shown the *likelihood* that the DNA evidence would demonstrate innocence on a more probable than not basis." (Emphasis added.) Put otherwise, a convicted person must show that the DNA evidence creates a likelihood that the defendant's innocence is more probable with the evidence than it would be without the DNA evidence.

Instead of placing equal weight on the terms of RCW 10.73.170, the majority's focus is on the term *innocence*. Majority at 11 n. 4 ("The legislature's use of the word 'innocence' indicates legislative intent to restrict the availability of postconviction DNA testing to a limited class of extraordinary cases where the results *could exonerate* a person who was wrongfully convicted of a crime. (emphasis added)). But the majority does not adequately support this focusing of the statute. Indeed, even the sponsors who presented the bill explained the substitute bill "changes the standard for granting a motion for postconviction DNA testing to a more probable than not *likelihood* that the DNA evidence would demonstrate innocence." H.B. Rep. on Substitute H.B. 2872, at 3, 58th Leg., Reg. Sess. (Wash. 2004). While I agree the changes focused on by the majority are

important, we should not discount the legislature's intentional inclusion of the term *likelihood*. By including the word *likelihood* in the statute, the legislature established a substantive requirement that the proposed evidence to be tested meet a sufficient level of potential relevance for the DNA evidence not a result requirement. Requiring Riofta to show the test would "could exonerate" him, focuses on the result and not the likelihood of demonstrating innocence on a more probable than not basis.

Courts presume the legislature did not include unnecessary language in the statute. *Judd v. Am. Tel. and Tel. Co.*, 152 Wn.2d 195, 202, 95 P.3d 337 (2004) (no part of a statute should be interpreted as meaningless). In other words, the motion should be granted if the proposed evidence would likely place the defendant outside the class of people who could have committed the crime on a more probable than not basis.

Here, a likelihood is present that the DNA evidence from the hat would demonstrate Alexander Riofta's innocence on a more probable than not basis if the DNA of another person was found that then identified someone else as the true shooter. If the DNA test results were favorable to Riofta, it has

the likelihood of demonstrating Riofta's innocence on a more probable than not basis. Such results would meet the substantive requirement for the grant of a motion for postconviction DNA testing. *See* RCW 10.73.170(3). Riofta's motion should have been granted, and DNA testing allowed.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:

Justice Richard B. Sanders

Justice Tom Chambers